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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-854

VALE DO RI DOCE NAVEGACAI, S. A.,

Petitioner,

versus

JOSEPH HENRY KYZAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO.

VALE DO RI DOCE NAVEGACAI, S. A.,

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JOSEPH HENRY KYZAR,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Vale Do Ri Doce Navegacai, S. A., respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the decision of the United States Court of Appeals for the Fifth Circuit rendered July 11, 1972, Docket No. 71-2702, reversing a judgment entered on a jury verdict in favor of petitioner and remanding the matter to trial to the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is authorized by U.S.C.A. Title 28, Section 1254(1).

The judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, was rendered on April 13, 1971 following a jury verdict on special interrogatories. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on July 11, 1972. A petition for rehearing and an alternative suggestion of a rehearing en banc was filed by petitioner on August 4, 1972, both of which were denied in a per curiam opinion rendered September 11, 1972. Motions were made for a stay of mandate pending the filing of this petition for certiorari which were granted on September 26, 1972, November 3, 1972 and November 29, 1972, the final order staying the mandate until December 9, 1972.

OPINIONS BELOW

The judgment of the lower court in response to special interrogatories directed to the jury, entered on April 13, 1971, together with the opinions of the United States Court of Appeals for the Fifth Circuit reversing the trial court and denying the petition for rehearing are printed in the appendix. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 464 F.2d 285 (1972) and the denial of the petition for rehearing is not yet reported.

QUESTIONS PRESENTED

1. Did the District Court's charge to the jury fairly and adequately state the theory of operational negligence as defined by this Court in Usner v. Luckenbach Overseas Corp.[1]?

2. Is the charge suggested by the United States Court of Appeals for the Fifth Circuit on operational negligence the proper charge to be utilized in future cases involving operational negligence?

STATEMENT

Mr. Kyzar, a longshoreman, filed this Sieracki[2] suit claiming damages against petitioner, Vale Do Ri Doce Navegacai, S.A., the shipowner, under the General Maritime Law for negligence and unseaworthiness. The shipowner subsequently filed a third-party claim for Ryan[3] indemnity against Cooper Stevedoring Company of Louisiana, Inc., Mr. Kyzar's employer, for breach of warranty of workmanlike performance. Prior to trial, the third-party complaint against the stevedore was

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1. 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed. 562 (1971).

2. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 Sup. Ct. 872, 90 L. Ed. 1099 (1946)

3. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 350 U.S. 124, 76 Sup. Ct. 232, 100 L. Ed. 133 (1956)

dismissed and the plaintiff's claim against the defendant-shipowner was tried to a jury. The jury found that the defendant was not negligent and the vessel was seaworthy. The lower court then entered a judgment in favor of defendant.

Mr. Kyzar was a longshoreman whose crew was engaged in discharging 60-foot lengths of structural steel with a shore crane from the M/V JAYME MAIA, a vessel which was owned and operated by petitioner, while the ship was moored at the Napoleon Avenue Wharf on the Mississippi River in New Orleans, Louisiana. As the crane operator (Mr. Kyzar's fellow employee) attempted to lift one load, Mr. Kyzar allegedly attempted to push the suspended beam, which swung, striking him and causing the injuries of which he complains. There was the usual discrepancies in the testimony of the various witnesses as to the actual facts surrounding the accident. The injured longshoreman claimed that the vessel was unseaworthy because it lacked tag lines, because he had not been furnished with a hard hat, and because the boom of the crane was improperly spotted over the hatch. The jury decided adversely to Mr. Kyzar on all three contentions, holding that the vessel was seaworthy and the shipowner was not guilty of any negligence. In charging the jury, the lower court gave a charge on operational negligence which has been reprinted in the appendix to this petition. In the course of the jury's deliberation, a request was made by the jury to define the use of the word "simultaneous" as it appeared in the Court's charge on operational negligence. Rather than explain a portion of the charge, the District Court reread its entire charge on unseaworthiness. The jury then returned its verdict in favor of the shipowner.

Notwithstanding the fact that Mr. Kyzar, the appellant below, made no claim in brief before the United States Court of Appeals for the Fifth Circuit that the charge on operational negligence was improper, that Court, on its own, raised the issue during argument and ultimately held that the charge was ambiguous and concluded that the jury's verdict should be set aside and the matter retried. The United States Court of Appeals for the Fifth Circuit, apparently concerned with the difficulties involved in explaining to a jury the Usner doc ine, referred to an operational negligen harge given in the Southern District of . York, suggesting that charge as "only a guideline" for future cases involving operational negligence. The "guideline" charge is contained in the opinion of the United States Court of Appeals for the Fifth Circuit. For the purposes of comparison, the charge given by the District Court and the charge suggested by the Court of Appeals for the Fifth Circuit are printed in the appendix in juxtaposition.

A petition for rehearing and alternatively suggesting a rehearing en banc was timely filed but promptly rejected in a September 11, 1972 per curiam opinion.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Fifth Circuit mistakenly stated the issue before it to be "whether the District Court properly instructed the jury on the difficult matter of operational negligence as unseaworthiness". The Court was apparently itself concerned about the Usner case when it engaged in the self-admonishment that "second guessing jury instructions is tricky business especially when the instructions required

exposition of the law on a subject not clearly settled by the Supreme Court and this Court." Although the appellate court may well have thought that this was the principal issue on appeal, it was not presented as such. The plaintiff, in his brief to the United States Court of Appeals for the Fifth Circuit, listed four assignments of error, none of which dealt with the District Court's charge on unseaworthiness in light of the Usner decision. What the United States Court of Appeals for the Fifth Circuit felt was the "chief bone of contention" was neither briefed nor adequately argued. The opinion rejecting the District Court's charge as ambiguous apparently stems from the Court's desire to set its own guidelines under which Usner cases should be tried. In that light, we suggest both charges should be reviewed by this Court.

While there is no doubt that Usner created problems regarding the manner in which the issue of operational negligence should be submitted to a jury, petitioner submits that the charge given by the District Court in this case, taken as a whole and read in its entirety, met the legal test of fairly and adequately submitting the issues of the case to the jury.[4] In concluding that the charge was ambiguous, the United States Court of Appeals for the Fifth Circuit was obviously concerned with only that portion of the charge on unseaworthiness relating to the use of the

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4. Nolan v. Greene, 383 F. 2d 814 (6th Cir. 1967)

word "simultaneous". The District Court had charged the jury that "there can be no unseaworthiness if the negligent act or improper use and the resulting injury are simultaneous". The word "simultaneous" was taken out of context by the Appellate Court as the entire charge, which was read twice to the jury, correctly stated the law and made it abundantly clear to the jury that there could be no unseaworthiness unless the negligent act had created a condition of unseaworthiness.[5]

In its desire to establish its own "guidelines" that United States Court of Appeals for the Fifth Circuit failed to analyze the substance of the entire charge given by the District Court. A reading of the charge of the District Court, word for word, side by side with the "guideline" charge, compels the conclusion that the District Court's charge was eminently correct. There can be no doubt, reading the charges side by side, that the lower court in this case clearly and fairly and adequately covered the subject. While it is always easier to second guess a District Court, away from the battle of the courtroom, the test should be whether the entire charge was fair and adequate, not necessarily perfect.

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5. The United States Court of Appeals for the Fifth Circuit made no mention of the fact that it previously had approved in Santiny v. Coastal Boat Operators, Inc., et al, 438 F.2d 976 (5th Cir. 1971) as both "luminous and correct" a charge on negligence and unseaworthiness. The charge in that case is reproduced in the appendix and contains the same use of the word "simultaneous" as employed by the District Court in this case.

We submit that the District Court's charge was fair and adequate and perhaps more importantly, met the requirements of this Court in Usner. The jury was charged that the stevedore can create a condition of unseaworthiness foisting liability upon the shipowner. The District Court specifically advised the jury of ways in which the negligence of the stevedore or its employees could create unseaworthiness visiting liability upon the ship.

Even though "the condition which created the unseaworthiness has existed only temporarily", the District Court made it clear to the jury that improper or negligent use of equipment by the longshoremen could create a condition of unseaworthiness either by use of the equipment or the method of handling cargo. Moreover, the District Court pointed out in clear and unambiguous language that, if the unseaworthy condition proximately caused the plaintiff's injury, he should recover.

When the District Court suggested to the jury that "an unsafe condition of the ship or unseaworthiness cannot be created if the negligent act or injury are simultaneous", did it not say precisely what the United States Court of Appeals for the Fifth Circuit approves in the "guideline" charge? When the negligent act and injury are simultaneous (as defined by Webster, "existing or happening at the same time"), there can be no recovery. The "guideline" charge suggests that when the negligence has not yet ripened into an unseaworthy condition, the shipowner is not liable. Are these not two ways of saying precisely the same thing, i.e., that the shipowner is not responsible unless the negligent act creates a condition of unseaworthiness? Does not the District Court's admonition that

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the vessel is unseaworthy and the shipowner liable, even if the unseaworthiness "has existed only temporarily", say precisely the same as the "guideline" charge when it states "if the momentary phase had ended and the act had ripened into a condition of unseaworthiness at the time the accident occurred". The jury in this case was charged that the owner had an absolute non-delegable duty for any condition of unseaworthiness whether created by the stevedore or by the ship or by other persons and that it could be held liable regardless of how temporary that condition was if it proximately caused the plaintiff's injury. The sentence of the District Court's charge immediately preceding the use of the word "simultaneous" makes this clear - the shipowner is liable "if the negligent acts of longshoremen create an unseaworthy condition which subsequently causes injury".

As we appreciate the opinion of the United States Court of Appeals for the Fifth Circuit, the charge was ambiguous because it could be interpreted as stating that improper conduct occurring simultaneously with the accident would not render the vessel unseaworthy, notwithstanding the existence of prior improper conduct which created an unseaworthy condition. We respectfully disagree. The jury was specifically instructed that an improper method of handling cargo would render the vessel unseaworthy and was instructed repeatedly that once the stevedore created an unseaworthy condition, the ship was responsible regardless of its origin, if that unseaworthiness was the proximate cause of the injury. The entire charge correctly advised the jury that "simultaneous" referred to a single act of negligence, not a continuous pattern of improper conduct or improper method. It thus fairly and adequately met the Usner test.

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2. This Court is aware of the large number of cases in the federal system involving the traditional longshoreman-ship-stevedore triangle. It must be remembered that this case was tried at a time when the impact of Usner was undetermined and there were no opinions, other than those of this Court, upon which the District Court could rely. In that context, we submit that the District Court gave a charge which fairly and adequately explained a new area of the law to the jury in light of the factual issues presented in the case. Further, we earnestly suggest to this Court that the "guideline" charge suggested by the United States Court of Appeals for the Fifth Circuit does not in any way improve upon or give further guidance to District Courts for it does no more nor no less than that which was done by the District Court in this case. If petitioner is to be deprived of its hard earned jury verdict for the sake of offering guidelines to other courts, those guidelines should be more precise. If guidelines be the desired result, this Court should undertake to define for the benefit of all the District Courts in the federal system the manner in which the "act-condition" dichotomy should be presented to a jury. Otherwise, the opinion of the United States Court of Appeals for the Fifth Circuit will invite further "second guessing" of District Courts and unnecessarily complicate this area of the law.

CONCLUSION

This lawsuit, which commenced as a routine Sieracki suit, now involves a question of significant importance in the longshoreman-ship-stevedore field of litigation. If the District Court's charge was incorrect, then the "guideline" charge suggested by the

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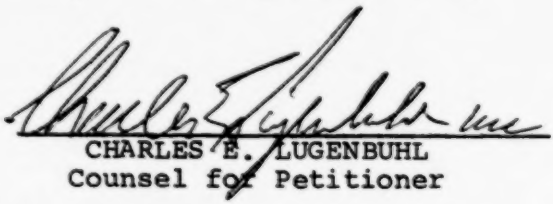
United States Court of Appeals for the Fifth Circuit is likewise inadequate and this Court should now give guidance to all future litigants. It is respectfully submitted that a writ of certiorari should be granted to review and reverse the decision by the United States Court of Appeals for the Fifth Circuit.

New Orleans, Louisiana, December 5, 1972.



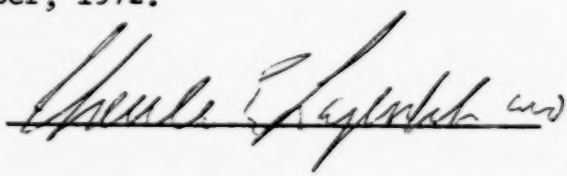
CHARLES E. LUGENBUHL
Counsel for Petitioner

LEMLE, KELLEHER, KOHLMEYER,
MATTHEWS & SCHUMACHER

Of Counsel

PROOF OF SERVICE

In furtherance of the Rules, I have served three copies of the above and foregoing petition for writ of certiorari upon all parties, by prepaid mail this 7 day of December, 1972.



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APPENDIX 1a

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

JOSEPH HENRY KYZAR	:	CIVIL ACTION
versus	:	NO. 70-2206
VALE DO RI DOCE NAVEGACAI, S. A.	:	SECTION "E"

: :

JUDGMENT

This cause came on a former day for trial by jury, and the Court, having considered the answers to special interrogatories submitted to the jury and being of the opinion that judgment should be rendered thereon in favor of defendant;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing from the defendant, Vale Do Ri Doce Navegacai, S. A., and that the complaint be and it is hereby dismissed, with prejudice, at plaintiff's costs.

New Orleans, Louisiana, this 13 day of April, 1971.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

[illegible] & Carl
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New Orleans, Louisiana 70112
Telephone: 523-1301
Attorneys for Plaintiff

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Deputy Clerk, U.S. District Court
Eastern District of Louisiana
New Orleans, La.

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APPENDIX 1b

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2702

JOSEPH HENRY KYZAR,
Plaintiff-Appellant,

versus

VALE DO RI DOCE NAVEGACAI, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 11, 1972)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

WISDOM, Circuit Judge: This longshoreman's suit for personal injuries presents the question whether the district court properly instructed the jury on the difficult matter of operational negligence as unseaworthiness. Second-guessing jury instructions is tricky business, especially when the instructions require exposition of the law on a subject not *clearly* settled by the Supreme Court and this Court. Still, we feel compelled to hold that the instructions at issue here confused the

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jury and deprived the plaintiff of a fair chance to persuade the jury of his version of the facts.

I.

On May 5, 1970, the plaintiff Joseph Henry Kyzar and other longshoremen employed by Cooper Stevedoring Company were engaged in unloading sixty foot lengths of structural steel from the M/V JAYME MAIA, owned and operated by the defendant Vale Do Ri Doce Navegacai, S.A. The ship was moored at the Napoleon Avenue Wharf in New Orleans. A shore level crane with a hundred foot boom hoisted the steel beams out of the Number 5 hatch of the JAYME MAIA. A fellow longshoreman of the plaintiff operated the crane. He could not see into the hold of the ship and, in deciding when to "boom up" or "boom down", relied upon hand signals from another longshoreman stationed on the deck of the ship overlooking the hatch.

On signal from this flagman, the crane operator first spotted the boom over the hatch. The crane cable was then hooked to the steel beams in the hold. Because the beams were some fifteen feet longer than the hatch opening, the load was "dipped" to get it clear of the hatch — moved to a catercornered position by the crane operator who would boom up or boom down.

Kyzar was injured while allegedly pushing the steel by hand to guide it out of the hatch. Kyzar testified: "a steel beam had been slung and the gear had begun to lift. The beam began to swing erratically and [Kyzar] was finally ridden by the beam to the bulwarks where he struck the side of the ship and fell into a

hole at the edge of the cargo." The defendant's evidence tended to disprove that Kyzar had pushed the beam. It indicated that Kyzar had negligently failed to heed a warning from the flagman designed to alert longshoreman to possible swings by the cargo as it was lifted.

The crux of Kyzar's legal position in the district court was that the JAYME MAIA was unseaworthy.[1] First, Kyzar argued, no tag lines[2] were provided to be used during manual guidance of the steel beams, despite a regulation of the Bureau of Labor Standards requiring that "loads requiring continual manual guidance while in motion shall be provided with tag lines."[3] Kyzar contended that the failure to provide tag lines violated the regulation and rendered the ship unseaworthy as a matter of law; or, that even if the regulation did not apply, proper equipment for the vessel would have

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[1]It is "fully settled that a shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and includes a longshoreman like the [appellant]." Usner v. Luckenbach Overseas Corp., 1971, 400 U.S. 494, 497-98, 91 S.Ct. 514, 27 L.Ed.2d 562, 566, citing Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099.

Moreover, "the scope of unseaworthiness is by no means ... limited [to the defective condition of a physical part of the ship itself]. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service." Usner v. Luckenbach Overseas Corp., *supra*, 400 U.S. at 499, 27 L.Ed.2d at 567. (footnotes omitted).

[2]A tag line is a line attached to a draft to guide it while it is in motion.

[3]29 C.F.R. § 1504.81(f) (1969).

included tag lines for the injury-causing unloading procedure.

Second, Kyzar tried to prove that the boom had been improperly spotted over the hatch and that this improper use of seaworthy equipment by the plaintiff's fellow longshoremen constituted an unseaworthy condition. Finally, Kyzar tried to show that he should have been provided with a "hard hat" during the unloading procedure. He based this contention, like his position on the need for tag lines, on both a BLS regulation[4] and on the fitness of the ship independently of those regulations.

The chief bone of contention in this Court is the lower court's charge to the jury on operational negligence, directly relevant to the alleged improper spotting of the boom and perhaps relevant to the tag line and hard hat issues as well. The charge was designed to require the jury to distinguish an unsafe *condition* amounting to unseaworthiness from a single negligent *act* of the plaintiff's fellow longshoremen:

> You must bear in mind that, in order for the ship owner to be liable for the negligent acts of the longshoremen, or for the improper use of seaworthy equipment by the [longshoremen], those acts or that use must create an unsafe condition of the ship or her appurtenances which subsequently causes injury. There can be no unseaworthiness if the negligent act

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[4] 29 C.F.R. § 1504.105(a) (1969).

or improper use and the resulting injury are simultaneous.

The law generally recognizes that a corporation is liable for the negligence of *its* employees. Therefore, a shipowner is not liable for the negligent acts of the stevedore's employees, that is, the longshoremen, but it becomes liable if the negligent acts of the longshoremen create an unseaworthy condition which subsequently causes injury. The law does not regard that an unsafe condition of the ship of unseaworthiness can be created if the negligent act and injury are simultaneous.

After deliberating for an undisclosed period of time, the jury asked the court for clarification of this part of the charge:

"Judge Cassibry:
We would like a diffinition [sic] of 'simultaneous' in reference to your charge on unseaworthiness causing an accident. Is it instantaneous or is it one contineous [sic] action?

GA White
Foreman"

The court recalled the jury and repeated its earlier charge on unseaworthiness without modifying the language defining operational negligence. After the jury asked for clarification of the meaning of "simultaneous", and after the trial court repeated the original language, counsel for the plaintiff specifically objected

to the unelaborated charge; counsel for the defendant agreed that the charge was misleading. Even the court itself expressed doubt:

THE COURT:
Are there any objections?

COUNSEL FOR PLAINTIFF:
After hearing that again, something does bother me. It is possible the jury might have gotten the impression negligence of employees simultaneous with injury will not permit recovery. Of course, if this is a condition of failure to supply or some other reason for unseaworthiness, there will be failure — there will be recovery even though the negligence is contemporaneous.

THE COURT:
I don't think that came through.
Mr. Lugenbuhl? [counsel for defendant]
You know, that's the reason I'm not going to change it, because you all will never agree on what I should tell them. And I don't blame you because that's an area we really need a lot of guidance on.

COUNSEL FOR DEFENDANT:
I don't agree with the charge that you gave, Judge.

THE COURT:
All right.

COUNSEL FOR DEFENDANT:

> • • • We again suggest to the Court the operation of negligence and the effect of the single act of negligence of fellow longshoremen should have been brought to the jury in light of the special charge that we previously requested. The thing, the crushing dilemma, if it be a dilemma, highlights the needs to properly establish precedent in these charges. We didn't think the Court did originally, and we renew our objection.

The charge was not changed, the jury returned a verdict in favor of the defendant in all respects, and this appeal followed.

II.

In considering the adequacy of the trial court's instructions to the jury, "we must consider the charge as a whole, in connection with the contentions made by the parties, and from the standpoint of the jury. If the charge in general correctly instructs, then even though a portion is technically imperfect, no harmful error is committed." *Troutman v. Southern Rwy. Co.*, 5 Cir. 1971, 441 F.2d 586, 590; *Webster v. Sea Drilling Corp.*, 5 Cir. 1969, 411 F.2d 411, 413; *Grey v. First National Bank*, 5 Cir. 1968, 393 F.2d 371, 387. "Our scrutiny of the district court's instructions must be orbitary and universal, not narrow and monocular." *McDaniel v. Slade*, 5 Cir. 1968, 404 F.2d 607, 609, and cases cited.

The trial court's charge to the jury cannot stand when, as a whole, the charge leaves us with substantial

and ineradicable doubt whether the jury has been properly guided in its deliberations. In the instant case the trial court's charge leaves us with precisely such doubt. We agree with the appellant that, particularly after the jury had indicated its bewilderment with the word "simultaneous" and the appellant had objected to a rerun of the original instruction, it was not enough for the trial judge to repeat the initial instruction on operational negligence.

The court was attempting — quite properly — to convey to the jury that "unseaworthiness is a condition" and that "the isolated, personal negligent act of the [plaintiff's] fellow longshoreman" through the improper use of nondefective equipment does not render a ship unseaworthy. *Usner v. Luckenbach Overseas Corp.*, 1971, 400 U.S. 494, 500, 91 S.Ct. 514, 27 L.Ed. 2d 562, 567.[5] An army of commentators has wrestled with the *Usner* distinction and often despaired of understanding its refinements.[6] Thus the task of charging a jury on the distinction between act and condition is one no trial judge welcomes and no appellate judge envies.

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[5]*Accord*, Dillon v. M.S. Oriental Inventor, 5 Cir. 1970, 426 F.2d 977; Antoine v. Lake Charles Stevedores, 5 Cir. 1967, 376 F.2d 443; Grigsby v. Coastal Marine Service of Texas, Inc., 5 Cir. 1969, 412 F.2d 1011; Robichaux v. Kerr McGee Oil Industries, Inc., 5 Cir. 1967, 376 F.2d 447; Reed v. MV Foylebank, 5 Cir. 1969, 415 F.2d 838.

[6]See, e.g., Ellman, Instant Unseaworthiness: Mascuilli Revisited, 1 J. Mar. L. 573 (1970); Edelman, Comment, 2 J. Mar. L. 871 (1971); Note, 13 B.C. Ind. & Comm. L. Rev. 568 (1972); Note, 49 Tex. L. Rev. 911 (1971); Note, 46 Tulane L. Rev. 309 (1971); Note, 32 La. L. Rev. 19 (1971).

Still, we are of the opinion that the instant instruction embodies a notion of operational negligence which, when interpreted from the jurors' point of view, conflicts with *Usner* and the developing law of unseaworthiness. In one sense, whether a negligent act or improper use by a fellow longshoreman and the resulting injury are "simultaneous" is relevant to a determination of unseaworthiness. An act of a fellow longshoreman has only an instantaneous duration when it begins or develops, for the first time, contemporaneously with injury to the plaintiff. And — whether for sound policy reasons or not — it appears that a greater-than-instantaneous duration is what converts a single act of negligence into a condition tantamount to unseaworthiness. The condition need not exist for long enough to permit discovery by a reasonably prudent shipowner. *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 70 S.Ct. 926, 4 L.Ed.2d 941. But the act must in some way have roots which can be traced back in time for more than the instant separating act and injury.

The relevant simultaneity, it must be noted, is that of injury and *inception* of substandard conduct, not injury and *simple occurrence* of substandard conduct. We explained this distinction recently in *Robinson v. Showa Kaiun K.K.*, 5 Cir. 1971, 451 F.2d 688, 690:

> *Usner* distinguished "instantaneous" unseaworthiness from what might be called "connected" unseaworthiness. A longshoreman or one of his fellows might engage in a *congeries* of negligence acts that are of such a character or that continue for such a length of time

that they become related to the status of the vessel. That *congeries* of acts might create a "condition" of unseaworthiness, so that an individual act of negligence within or after the *congeries* might give rise to liability under the unseaworthiness doctrine. However, if the negligent act of a longshoreman is not part of any *congeries* of negligent acts connected to the status of the vessel or to its loading but is rather an isolated "instantaneous" act of negligence within an otherwise seaworthy method of loading on an otherwise seaworthy vessel, then that one act of negligence by the longshoreman or his fellows will not render the vessel unseaworthy. *Compare* Alexander v. Meiji Kaiun K.K. D.C. La. 1961, 195 F. Supp. 831, *aff'd sub nom* Strachan Shipping Co. v. Alexander, 5 Cir. 1962, 311 F.2d 335, *with* Taylor v. S.S. Helen Lykes, 5 Cir. 1968, 402 F.2d 777, and Usner v. Luckenbach Overseas Corp., *supra*.

For example, a single act of an incompetent crewman — a violent attack on a fellow crew member — may demonstrate the unseaworthiness of the crew, but only if the assailant has previously demonstrated a "savage disposition." *Boudoin v. Lykes Brothers Steamship Co.*, 1955, 348 U.S. 336, 75 S.Ct. 382, 99 L. Ed. 354. This restriction on recovery in the *Boudoin* situation reflects the need to link the substandard conduct of fellow crewmembers to an earlier point in time — when the disposition for violence established itself in the assailant's personality and thereby created the

condition of his unfitness for service with other men. Similarly, "a continuous course of negligent conduct by a crewman, when coupled with a negligent act which results in injury, could provide a basis for an unseaworthiness recovery. The course of negligent conduct would be evidence of the incompetence of the crew to meet the contingencies of the voyage and of the crew's unsuitability for its intended service. The single negligent act which causes injury is not evidence of unseaworthiness per se but it does serve to connect the injury with the existing unseaworthy condition. The single act would establish the requisite causal connection between the unseaworthy condition of the crew, as evidenced by the continuing course of negligent conduct on the part of the crewman, and the injury to the seaman." Unseaworthiness and Operational Negligence: Condition versus Cause — *Usner v. Luckenbach Overseas Corp.*, 13 B.C. Ind. & Comm. L. Rev. 568, 580 (1972).

It is apparent from the foregoing analysis that a trial court invites serious confusion by instructing against liability in unseaworthiness "if the negligent act or improper use and the resulting injury are simultaneous." For the jury may well believe that an individual act causing immediate injury cannot reflect unseaworthiness even though the act occurs within or after "a *congeries* of negligent acts that are of such a character or that continue for such a length of time that they become related to the status of the vessel." *Robinson v. Showa Kaiun K.K., supra.* In the present case, the unelaborated use of "simultaneous" would permit the jury to believe the plaintiff's contention that the boom was spotted incorrectly throughout the unload-

ing operation — plainly a condition of unseaworthiness — and yet still deny recovery. The jury might reason that the injury occurred simultaneously with continued improper spotting of the boom by Kyzar's fellow longshoreman. The instruction was fatally ambiguous.

When a trial court must charge on operational negligence, the court's first responsibility is to establish, in so many words, the Supreme Court's own distinction between operational negligence and unseaworthiness. The jury must be told to distinguish between an "isolated, personal negligent act of [a] fellow longshoreman" and an individual act of such duration or character that it may be described as a condition of the crew and consequently the vessel itself.

In defining an "isolated, personal negligent act of a fellow longshoreman," a court may wish to suggest the relevance of the time when the act causing injury first commences. We do not say that the consideration is entirely beside the point. We do say, though, that the potential for confusion is great when a jury is told to determine operational negligence by considering the simultaneity of act and injury. Once the concept is launched into the jury's minds, it is hard to see how it can be adequately explained in less than several complex sentences. We seriously doubt that the jury will do better after a heavy dose of "simultaneous" than it would if left to distinguish a single isolated act of negligence from an act traceable to a time prior to injury and therefore linked to the condition of the vessel or its crew.[7]

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[7]As an Appendix to this opinion we have reprinted the charge on operational negligence given by Judge Edward Weinfeld of

III.

For the interests of judicial economy, other alleged defects in the charge deserve brief comment. The appellant complains of the trial court's handling of the instruction on tag lines.* First, the appellant objects to the court's failure to charge specifically that the failure to provide tag lines might still constitute unseaworthiness even though the Bureau of Labor Standards regulation did not apply to the facts of this case. Second, Kyzar objects to the failure of the court to reread, after the jury was recalled for further instructions, the original charge on the tag line regulations.

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the Southern District of New York. Norfleet & Lane v. Isthmian Lines, Inc., Civil Action No. 142-95 & 96, (S.D.N.Y., Nov. 23, 1966). Although this charge was given before the Supreme Court decided *Usner*, we believe that the charge puts before the jury, a lucid and comprehensible exposition of operational negligence. Of course, we cannot now foresee all objections to this charge arising in the thousands of specific factual settings to be litigated in the future. Nor have we any jurisdiction to decide those cases by promulgating a uniform charge on operational negligence, binding in advance. The charge is only a guideline.

*The Court's charge read as follows:

> "Certain Federal Regulations promulgated by the Bureau of Labor Standards of the United States Department of Labor were introduced into evidence in this case. I have found as a matter of law that the Regulation requiring hard hats does not apply and was not violated in this case.
>
> If you find that the Regulation requiring the use of tag lines was violated, this constituted negligence as a matter of law and the vessel was rendered unseaworthy as a matter of law, and if such unseaworthiness or negligence was a proximate cause of plaintiff's injuries, defendant shipowner would be liable."

It was not repeated when the jury was recalled for further instructions on unseaworthiness.

We feel it unnecessary to comment on the failure to reread the tag line instruction when the jury was recalled. The problem is unlikely to recur during the second trial of this cause. However, given the central importance of the dispute over tag lines, the court's initial instruction should have told the jury specifically that the failure to provide tag lines might constitute unseaworthiness even if the lines were not required by BLS regulations.[9] The court's actual instruction carried a strong implication that unseaworthiness, as it related to the tag line issue, could be made out only by a finding that the regulation had been violated. Moreover, the jury should have been reminded specifically of the terms of the tag line regulation, and required to find the Regulation applicable if it determined this load to have required continuous manual guidance while in motion. There was much clarity to gain and little to lose by such a reminder, even though the Regulation was in evidence and had been referred to extensively in summation.

As for the hard hat charge, the court instructed that the hard hat regulation was inapplicable as a matter of law, but did not instruct that the regulation was not dispositive. The inevitable effect of the instruction was to suggest that the jury need not consider the plaintiff's contentions that hard hats ought to have been provided as part of the ship's equipment.

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[9]After the initial reading of the charge, Kyzar's lawyer stated, "I do take exception to there not being a charge that although there may be no labor standards governing a particular condition of seaworthiness you may still find unseaworthiness to be the cause of the accident."

Finally, we note the appellant's contention that the court's instruction on "spotting the boom" was too general[10] and should have stated in context that "a boom that is spotted incorrectly renders the vessel unseaworthy." We agree.

Because the court's instruction on operational negligence, repeated after confusion was apparent, was confusing and may have substantially deprived the plaintiff of fair treatment by the jury, we conclude that the judgment below must be VACATED and the cause REMANDED for a new trial.

APPENDIX: See footnote 7

The law distinguishes between a condition and an act, which may or may not bring about a condition of unseaworthiness.

Now this concept involves a rather fine distinction.

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[10]The district court gave the following instruction on "spotting the boom":

> "The plaintiff contends that. . . improper spotting of the boom caused the ship to be unseaworthy and caused him to be provided with an unsafe place to work." "Improper or negligent use of seaworthy equipment by plaintiff's fellow longshoremen may create a condition of unseaworthiness. A shore crane used by a stevedore in the unloading of a ship is considered as part of the ship's gear for purposes of the issue of seaworthiness. Improper methods of handling cargo may create a condition of unseaworthiness even though the equipment used is in reasonably safe condition."

The two paragraphs were not consecutive in the original charge.

Some courts have referred to it as a metaphysical distinction, or "hairsplitting," but nonetheless it exists.

I will try to simplify it for you, since you are called upon to make the determination of whether the ship was in fact unseaworthy.

Unseaworthiness is a condition whereby a vessel or its equipment is not reasonably fit for its intended use, and if that condition of unfitness exists at the time of the accident, and as a result a crew member or longshoreman is injured, the shipowner is liable no matter how the condition was brought about or who brought it about.

Indeed, if the condition exists, whether it was brought into existence by the ship's crew, a third party, or even an injured's fellow employee, the shipowner would still be liable.

Now, let us take a seaworthy vessel with appliances that are reasonably fit for their intended use or purpose on which normal operations are in process.

And during the course of such operations the previously fit ship or appliance is rendered unsafe because of the negligent act of some person.

In such an instance, if the negligent act itself is in process and has not yet ripened into an unseaworthy condition, the act, during its commission, is referred to as operational negligence — and in that limited circumstance the shipowner would not be liable.

In other words, if the defect arose as a momentary step or a phase in the progress of work aboard an otherwise seaworthy ship, and was an incident in the continuous course of operation, — and an unseaworthy condition had not yet resulted, the shipowner is not liable.

On the other hand, if the momentary phase had ended and the act had ripened into a condition of unseaworthiness at the time the accident occurred, then the shipowner is responsible.

Thus, there is a point at which negligent conduct ends and an unseaworthy condition begins.

If the act results in the condition of unseaworthiness at the time of the accident, then the owner is liable; if the act falls short of creating the condition at the time of the accident, it is not.

Actually, the controversy here centers about the parties' respective contentions as to whether the accident was due to unseaworthiness or caused by operational negligence, or as the lawyers referred to it in their summations, an instantaneous act.

APPENDIX 1c

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2702

JOSEPH HENRY KYZAR,
Plaintiff-Appellant,

versus

VALE DO RI DOCE NAVEGACAI, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 11, 1972, 5 Cir., 1972, ____ F.2d ____).

(September 11, 1972)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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APPENDIX 1d

Weinfeld, J.	Cassibry, J.
"The law distinguishes between a condition and an act, which may or may not bring about a condition of unseaworthiness. Now this concept involves a rather fine distinction. Some courts have referred to it as a metaphysical distinction, or "hairsplitting", but nonetheless it exists. I will try to simplify it for you, since you are called upon to make the determination of whether the ship was in fact unseaworthy. Unseaworthiness is a condition whereby a vessel or its equipment is not reasonably fit for its intended use, and if that condition of unfitness exists at the time of the accident, and as a result a crew member or longshoreman is injured, the shipowner is liable no matter how the condition was brought about or who brought it about.	"Seaworthiness under Maritime Law every shipowner or operator owes to every member of the crew employed aboard the ship the duty of keeping and maintaining the ship and all decks and passageways, appliances, gear, tools and equipment of the vessel in a seaworthy condition at all times. This duty extends also to any person who goes aboard the vessel in order to perform work traditionally done by seamen and to any person acting in the service of the vessel, such as a longshoreman, even if the person is not employed by the shipowner. The vessel owner does not undertake, and it is not incumbent upon him, to provide an accident-proof vessel. The mere fact that you may find that an accident occurred and plaintiff was injured, without more, does not establish

Weinfeld,J.

Indeed,if the condition exists whether it was brought into existence by the ship's crew,a third party, or even an injured's fellow employee,the shipowner would still be liable.

Now,let us take a seaworthy vessel with appliances that are reasonably fit for their intended use or purpose on which normal operations are in process.

And during the course of such operations the previously fit ship or appliance is rendered unsafe because of the negligent act of some person.

In such an instance,if the negligent act itself is in process has not yet ripened into an unseaworthy condition, the act,during its commission,is referred to as operational negligence - and in that limited circumstance the shipowner would not be liable.

In other words,if the defect arose as a momentary step or phase in the progress of work aboard an otherwise seaworthy ship,and was an

Cassibry,J.

that the vessel was unseaworthy.

To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used for the purpose or use for which it was provided or intended.

In order to be seaworthy the standard is not that of perfection. The shipowner's duty is discharged when it provides a vessel that is reasonably adequate in hull,gear and equipment,and manpower for the trade or service in which the vessel is employed. Seaworthiness therefore does not mean that a vessel and equipment must be perfect in all respects at all times. All that is required is that the vessel and equipment be reasonably fit for the use for which they were intended. Thus,the vessel owner was not obliged to furnish the best, most modern and most convenient appliances.

The duty of the

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incident in the continuous course of operation, -- and an unseaworthy condition had not yet resulted,the shipowner is not liable.

On the other hand, if the momentary phase had ended and the act had ripened into a condition of unseaworthiness at the time the accident occurred, then the shipowner is responsible.

Thus,there is a point at which negligent conduct ends and an unseaworthy condition begins.

If the act results in the condition of unseaworthiness at the time of the accident, then the owner is liable; if the act falls short of creating the condition at the time of the accident, it is not.

Actually, the controversy here centers about the parties' respective contentions as to whether the accident was due to unseaworthiness or caused by operational negligence, or as the lawyers referred to it in their summations, an instantaneous act."

vessel owner to provide a seaworthy vessel is an absolute one. It exists regardless of fault on the part of the shipowner,and does not depend upon negligence or fault or blame. That is to say, the vessel owner is liable for all injuries and consequent damages caused proximately by an unseaworthy condition existing even though the owner may have exercised due care under the circumstances and may have had no knowledge or notice of the unseaworthy condition that caused the damage. The vessel may be unseaworthy even though the condition which created the unseaworthiness has existed only temporarily, and the owner had no opportunity to remedy it.

The obligation of the vessel owner to provide a seaworthy vessel is non-delegable. The owner may not delegate that duty to anyone. It cannot be contracted away by requiring

LOSE IN CENTER

a shoreside contractor to supply men and equipment for unloading the ship, nor can it be avoided by abandoning part of the vessel to such contractors. In other words, the owner of a vessel cannot relieve himself of the duty to provide a seaworthy vessel by shifting it to some other party by means of contract, either express or implied.

The stevedoring company may create an unsafe condition on the ship by failing to supply proper equipment or through negligent acts of its longshoremen and cause the vessel owner to be liable on account of the unseaworthiness. Improper or negligent use of seaworthy equipment by plaintiff's fellow longshoremen may create a condition of unseaworthiness. A shore crane used by the stevedore in the unloading of a ship is considered as part of the ship's gear for purposes of the issue of seaworthiness.

Improper method of handling cargo may create a condition of unseaworthiness even though the equipment used is in reasonably safe condition. That a method of unloading cargo has been used in the past without mishap is relevant to, but not necessarily determinative of, the question whether the method used for unloading is a proper one. The customary standards or general practice of the industry is pertinent to the issue of due care, but is not the only test. There may be precautions so necessary that the industry's general disregard of them will not excuse their omission.

You must bear in mind that, in order for the ship owner to be liable for the negligent acts of the longshoremen, or for the improper use of seaworthy equipment by the, them, those acts or that use must create an unsafe condition of the ship or her appurtenances which

subsequently causes injury. There can be no unseaworthiness if the negligent act or improper use and the resulting injury are simultaneous.

The law generally recognizes that a corporation is liable for the negligence of its employees. Therefore, a shipowner is not liable for the negligent acts of the stevedore's employees, that is, the longshoremen, but it becomes liable if the negligent acts of the longshoremen create an unseaworthy condition which subsequently causes injury. The law does not regard that an unsafe condition of the ship or unseaworthiness can be created if the negligent act and injury are simultaneous."

APPENDIX 1e

Extract of charge given by the District Court in Louis Santiny v. Coastal Boat Operators, Inc. and Insurance Company of North America contained in the record before the United States Court of Appeals for the Fifth Circuit Docket No. 27986.

"Now there is another manner through which a vessel may become unseaworthy, and that is through the negligent use of otherwise seaworthy equipment by plaintiff himself or his co-employees, if you should find from a preponderance of the evidence that such negligence occurred. However, it is not every negligent use of otherwise seaworthy equipment which renders a vessel unseaworthy.

Under the law, there is no unseaworthiness if the negligence occurs simultaneously or instantaneously with the injury to the seaman. Thus, the operational negligence of the plaintiff himself or of a co-worker, occurring at the very moment of plaintiff's injury, does not render the vessel unseaworthy for the reason that a sufficient time has not intervened between the negligent act and injury, such that it can be said that a condition has come into existence.

Therefore, should you find from a preponderance of the evidence that there was negligence on the part of the plaintiff alone or on the part of his co-employees or on the part of both, the plaintiff and the co-employee, then you must determine whether or not such negligence occurred simultaneously of instantaneously with the plaintiff's injury. (358)

If the negligence and the injury are found to be simultaneous, then no seaworthy condition was created. If the negligence preceded the injury by a sufficient time to create a condition and if the evidence further establishes that the condition thus created deprived the plaintiff of a reasonably safe place in which to work, then the vessel would be unseaworthy.

Should you make such a finding, you would then proceed to determine whether such condition was a proximate cause of the plaintiff's injury and, if you do, the extent to which, if any, negligence on the part of plaintiff himself proximately caused his own injury."